FILED

961225 JAN 30 1997

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No.

In the Supreme Court of the United States

October Term, 1996

Thomas A. Markson and Sandra M. Markson

Petitioners,

v.

A. & W. Investors Group, Inc.

Respondent.

On Petition for Writ of Certiorari to the
Court of Appeals of the State of Arizona, Division One

Petition for Writ of Certiorari

Thomas A. Markson
Sandra M. Markson
c/o 5804 West Vista Avenue #165
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*Petitioners, In Propria Persona

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SUPREME COURT, U.S.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner's are required to have and prove standing to bring an action in wrongful levy under 26 U.S.C. § 7426 in order to have standing to bring an action in quiet title under Arizona law?

THE PARTIES

The only parties are those who appear in the caption of the case.

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The Petitioners, Thomas A. and Sandra M. Markson (Marksons), hereby Petition this Court for a Writ of Certiorari to the Court of Appeals of the State of Arizona, Division One to review its April 30, 1996 decision.

OPINION OF THE COURT BELOW

The decisions and orders of the Arizona Superior Court in Maricopa County, the Court of Appeals and the Supreme Court were unpublished and are found in Appendix A to the Petition.

JURISDICTION

The Court of Appeals of the State of Arizona entered its judgment affirming the Superior Court's judgment of dismissal of the Markson's Complaint on April 30, 1996. [App., Pgs. A-5 to A-10]. The Marksons timely filed their Motion for Reconsideration which was denied on May 20, 1996. [App., Pg. A-3]. The Marksons timely filed their Petition for Review with the Supreme Court of the State of Arizona which was denied on November 1, 1996. [App., Pg. A-1]. The jurisdiction of this Court to review the judgment of the Supreme Court's judgment denying the Petition for Review by writ of certiorari is invoked under the provisions of 28 U.S.C § 1257.

STATUTORY PROVISIONS INVOLVED

The following statutes are involved. The text of each provision is found in Appendix B. A.R.S. §§ 12-524 and 12-1101 *et. seq.*; 26 U.S.C. §§ 6532 and 7426.

STATEMENT OF THE CASE AND FACTS

1. On September 15, 1980, Charles D. and Pamela L. Schaut took title to the property described as Lot Fifty-Four (54), SAND OASIS, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 108 of Maps, page 10.

(Hereinafter "property") aka 4309 West Griswold, Glendale, Arizona 85302 by Joint Tenancy Deed. Said Deed is recorded at Docket 14946, Page 12, in the County Recorder's Office, County of Maricopa, State of Arizona. [App. Pg. A-6; CMPL[1], ¶¶ 3 and 8, App. Pg. A-15 - A-16].

2. On August 20, 1982, Charles D. and Pamela L. Schaut exchanged into the Dare Schaut Family Trust (hereinafter "Trust"), title to the above described property by Quitclaim Deed. Said Deed is recorded in Docket 16302, Page 440, in the Office of the County Recorder, County of Maricopa, State of Arizona. [App. Pg. A-6; CMPL, ¶ 9, App. Pg. A-16]

3. For the years 1979 through 1986 Charles D. Schaut was allegedly assessed taxes totalling $1,409,593.90. The assessments for the years 1979 and 1980 allegedly occurred on November 6, 1989. The assessments for 1981 to 1984 allegedly occurred on June 4, 1990. The assessments for 1985 and 1986 allegedly occurred on June 11, 1990. [CMPL, ¶ 6, App. Pg. A-16].

1/ As the Court of Appeals disposed of the matter on the standards for Failure to State a Claim upon Which Relief can be Granted. *See* App. Pgs. A-7 and A-10. Under this standard this court must assume the facts alleged in the Complaint are true. *Fla. Gen. Contractors v. Jacksonville*, 508 US _____, 124 L.Ed.2d 586, 599, 113 S.Ct. _____, (1993), citing *Lucas v. South Carolina Coastal Council*, 506 US _____, _____, n.3, 120 L.Ed. 798, 810-11, n.3, 112 S.Ct 2886 (1992); *Pennell v. San Jose*, 485 US 1, 7, 99 L.Ed.2d 1, 108 S.Ct 849 (1988). In addition to references to those facts found by the Court of Appeals not inconsistent with this standard, the Marksons will also make reference to the Complaint, which is included in the Appendix to this Petition at Pages A-15 to A-21, for the forthcoming statement of facts. Reference to the facts from the Complaint will be noted by the abbreviation CMPL and the paragraph (¶) number along with the Page reference to the Appendix [*e.g.* CMPL, ¶ 2, App. Pg. A-15]. Reference to the Appendix for other matters and facts will otherwise be noted as [App. Pg. A-6]

4. For the years 1979 through 1987 Pamela L. Schaut was allegedly assessed taxes totalling $98,465.84. All the assessments allegedly occurred on May 31, 1991. [CMPL, ¶ 7, App. Pg. A-16]

5. On September 13, 1993, the United States by and through its officers, agents and employees in the Internal Revenue Service (hereinafter IRS), purportedly seized the property. The property was allegedly seized to satisfy the tax assessments against Charles Dare and Pamela Schaut. The Notice of Seizure was given on September 13, 1993 by mailing it to the Schauts via Certified Mail. [App. Pg. A-6; CMPL, ¶ 10, App. Pg. A-17].

6. On October 26, 1993, the United States, by and through the IRS, purportedly sold said seized property to A & W Investment Group ("A & W") and then and there issued a Certificate of Sale to A & W. Notice of the Sealed Bid Sale was allegedly given by leaving the Notice of Sale at 4309 West Griswold, Glendale, Arizona 85302, but without personally delivering it to either the Schauts or their authorized agents. [CMPL, ¶ 11, App. Pg. A-17].

7. Neither the Notice of Seizure nor the Notice of Sale were given either personally or otherwise to the Trustees of the Trust. [CMPL, ¶ 12, App. Pg. A-17].

8. On May 18, 1994, the District Director in Phoenix, Arizona executed the Director's Deed transferring to A & W any interest that the United States had acquired, if there was any, through the seizure and sale. The Deed was recorded in the County Recorder's Office on May 23, 1994 at instrument number 94-0410768. [CMPL, ¶ 13, App. Pg. A-17].

9. At the time the property was seized, the Trust was the owner of record, was not liable to pay any taxes and there were no liens in favor of the United States against the Trust for any taxes. [CMPL, ¶ 15, App. Pgs. A-17 - A-18].

10. At the time the Schauts transferred title to the property to the Trust, there were no assessments or liens in favor of the United States against the Schauts. [CMPL, ¶ 16, App. Pg. A-18]

11. Before the United States could assert its lien against the property, it was required to have the transfer set aside as a fraudulent transfer. Even assuming arguendo that the transfer from Charles D. and Pamela L. Schaut to the Trust was fraudulent as to United States, the limitation for obtaining the required judicial declaration expired on September 22, 1986. The Deed, transferring title from Charles D. and Pamela L. Schaut to the Trust, was recorded on September 22, 1982. The limitation for setting aside fraudulent transfers is four (4) years. [CMPL, ¶ 18, App. Pg. A-18].

12. Prior to seizing and selling the property belonging to the Trust, the United States did not assess taxes against the Trust as the Transferee of Charles D. and Pamela L. Schaut. [CMPL, ¶ 19, App. Pg. A-18].

13. Prior to seizing and selling the property belonging to the Trust, the United States failed to follow the procedures required to establish that the Trust was a Nominee or Alter Ego of Charles D. and Pamela L. Schaut. [CMPL, ¶ 20, App. Pg. A-18]

14. Prior to seizing and selling the property Revenue Officer Richard B. Foley failed to obtain the Director's Warrant for Distraint. [CMPL, ¶ 21, App. Pg. A-18] Even if the property were to be found to belong to Charles D. and Pamela L. Schaut, prior to seizing and selling the property, Revenue Officer Richard B. Foley failed to obtain consent to seize the primary residence. [CMPL, ¶ 22, App. Pg. A-19].

15. After the United States first seized the property belonging to the Trust for the tax debts allegedly due and owing by Charles and Pamela Schaut an action was filed by the Trustees of the Trust and the Schauts in the

superior Court in Maricopa County at docket CV 93-25424. [App. Pg. A-6].

16. On November 9, 1994, the Superior Court entered its formal judgment dismissing the action **without prejudice** to the "Dare Schaut Family Trust, its successors and/or assigns" and it gave the Trust, its transferees and/or assigns, until November 29, 1994 to refile the action. [App. Pg. A-6].

17. The Marksons are successors in interest of the Trust to the property. [App. Pg. A-8; CMPL, ¶ 3, App. Pg. A-15 - A-16]

18. On October 7, 1994, the interest of the Trust was transferred to the Marksons via quit claim deed that was recorded in the office of the County Recorder, County of Maricopa, State of Arizona at instrument number 94-0733641. [App. Pg. A-7; CMPL, ¶ 14, App. Pg. A-17].

REASONS FOR GRANTING WRIT & ARGUMENT

1. The Arizona Court of Appeals decision that the Marksons can succeed in their quiet title action only if they support a claim of wrongful levy against the IRS, decided an important federal question in a way that conflicts with the decisions of another state court of last resort as well as that of a United States Court of Appeals and further involves an important question of federal law that has not been, but should be, settled by this Court. Despite the Arizona Court of Appeal's attempt to characterize it as such, this action does not involve any form of a wrongful levy claim under 26 U.S.C. § 7426. The Court of Appeals has incorrectly construed an action in quiet title arising from an invalid levy, as a result of procedural defects in the seizure of the property leading up to the tax sale, as being an action in wrongful levy. The Arizona Court of Appeal's decision amounts to the proverbial mixing of apples and oranges.

As the plain language of 26 U.S.C. § 7426 reveals a wrongful levy claim arises when a third party who is not the taxpayer has property seized to satisfy the tax debt of another. While the Trust was just such a third party, that is, the Trust's property was seized in an attempt to satisfy the tax debt of the Schauts, the Trust did not bring such an action. The Marksons' action in quiet title challenging A & W's title to the property because of the procedurally invalid seizure and sale (*e.g.* an invalid levy) is not dependant upon the Trust's capacity to sue for wrongful levy and the Marksons' quiet title action, as the successors in interest to the Trust, is not the functional equivalent of a wrongful levy.

As this Court and the lower courts, both state and federal have held, the failure to strictly adhere to the statutory requirements in making the seizure and sale renders the sale invalid and any title arising therefrom void. *Thatcher v. Powell*, 6 Wheat. 119, 125, 5 L.Ed. 221, 222 (1821); *Powelson v. U.S.*, 979 F.2d 141, 144 (9th Cir. 1992) (failure to personally serve the notice of seizure and notice of seizure sale renders sale and deed void); *Goodwin v. U.S.*, 935 F.2d 1061, 1065 (9th Cir. 1991) (same); *Reece v. Scoggins*, 506 F.2d 967, 971 (5th Cir. 1975) (same); *Kulawy v. U.S.*, 917 F.2d 729, 735 (2nd Cir. 1990) (sale before the expiration of the 10 day minimum of the Notice of Sale); *Thompson v. U.S.*, 66 F.3d 160, 161-62 (8th Cir., 1995) (administrative enforcement of lien and levy through seizure does not attach to property transferred or sold by taxpayer to third party before date of assessment); *Blevins v. Proprietor Property Trust*, 884 P.2d 861 (Okl.App., 1994) (same); *Pate v. U.S. Dept. of Treasury I.R.S.*, 949 F.2d 1059, 1060 (10th Cir., 1991) (same); *St. Louis Union Trust Co. v. United States*, 617 F.2d 1293, 1301 (8th Cir., 1980) (same); See also *Montgomery v. United States*, 967 F.2d 588 (9th Cir., 1992); *Elfelt v. Cooper*, 168 Wis.2d 1008, 485 N.W.2d 56

(Wis. 1992); *Kelly v. Lunding*, 131 Ill. App.3d 410, 475 N.E.2d 1093 (1985); *Brown v. United States*, 496 F.Supp. 903 (D.N.J., 1980); *Jones v. New Pittsburgh Courier Pub. Co.*, 364 A.2d 1315 (1976); *United States v. Heffner*, 420 F.2d 809 (4th Cir., 1969); *Popp v. Eberlein*, 409 F.2d 309 (7th Cir., 1969), cert. denied, 396 U.S. 909; *McCampbell v. Dinuzzo*, 270 N.Y.S.2d 685 (1966)

A quiet title action for a procedurally invalid levy is not the equivalent of wrongful levy and a procedurally invalid levy would not generally permit an action in wrongful levy. A quiet title action and wrongful levy action are two independent forms of action and are dependent upon divergent elements and facts. Simply put, the wrongful levy statute, 26 U.S.C. § 7426, **"DOES NOT APPLY"** to quiet title actions under state law. *Vanderpool v. Sawyer*, 865 P.2d 446, 449 (Or.App., 1993). (reference to the tax lien procedures to determine validity of tax sale does not transform an action for quiet title against a tax sale purchaser into an action for wrongful levy which must be brought against the United States).

Every Court that has had occasion to address the issue of wrongful levy against the United States under 26 U.S.C. § 7426 and an action for quiet title against the tax sale purchaser under state law, have, "**without exception**" rejected the conclusion reached by the Arizona Court of Appeals. *Vanderpool v. Sawyer*, supra; *World Marketing, Ltd. v. Hallam*, 608 F.2d 392 (9th Cir., 1979); *Omnibus Financial Corp. v. United States*, 566 F.2d 1097 (9th Cir., 1977)[2]; *Crow v. Wyoming Timber Products Co.*, 424 F.2d 93 (10th Cir., 1970) (action ordered remanded to state court, as quiet title action against tax sale purchaser presented case under state law and not a wrongful levy claim against United States).

2/ *Omnibus*, supra, originated in the United States District Court here in Arizona over property levied here in Arizona.

In each case, the Court noted that nothing in the language or history of 26 U.S.C. § 7426 precludes "one with an interest in property seized and sold by the United States from pursuing a claim against a subsequent purchaser in state court." *Vanderpool*, supra, at 448; *World Marketing*, supra, at 394; *Omnibus*, at 1103 and n.26 (notwithstanding the fact that the 9 month statute of limitations had expired for wrongful levy, the court noted the existence of a remedy against the tax sale purchaser to determine the extent of Arizona Turf Supply's ownership)[3] *citing Aqua Bar & Lounge v. United States Dept. of Treasury*, 539 F.2d 935 (3rd Cir., 1976).

Given that *Omnibus*, supra, concluded that an action would lie against the purchaser, such an action and the extent of the ownership would be determined under state law, which in this case is Arizona Law. *cf. Elfelt v. Cooper*, 168 Wis.2d at 1019 (*citing United States v. National Bank of Commerce*, 472 US 713, 722, 86 L.Ed.2d 565, 105 S.Ct. 2919 (1985) noted that the Internal Revenue Code "does not create any property rights, but merely attaches federally defined consequences to rights which are created under state law.") The issues involved here are property rights. Thus, because Internal Revenue Code does not create property rights, but merely attaches federally defined consequences to rights which are created under state law, even in an action under 26 U.S.C. § 7426 the Courts would be required resort to state law before a party could assert that it was a third

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3/ Not only did the Arizona Court of Appeals conclude that the lack of a wrongful levy claim precluded the Marksons quiet title claim, but the Court further opined that "even if the Trust could have and had assigned its wrongful levy claim to the Marksons, the nine month wrongful levy statute of limitations bar this action,... *See* I.R.C. § 6532(c)(1) (1986)" as opposed to the five year limitation for quiet title claims under Arizona Law as set forth in A.R.S. § 12-524.

party whose property was wrongfully levied. *cf. Blevins*, supra, 884 P.2d 863 (Okl.App., 1994). The Appellate Court's decision is directly contradictory to this principle, because its analysis has made the remedy under the federal wrongful levy statute the controlling factor for determining the Marksons' property rights and remedies under state law.

It is clear that an action in wrongful levy can be brought against the United States **as well as an** action in quiet title under state law against the purchaser. No Court has ever held that an action in quiet title under state law is dependant upon the existence of a remedy for wrongful levy under 26 U.S.C. § 7426 or that an action for wrongful levy is dependant upon the existence of remedy for quiet title under state law.

The Court of Appeals correctly found that "[b]ecause the quitclaim deed was sufficient to transfer to the Marksons any property interest held by the Trust, the Marksons could file an action to secure whatever rights they received in the underlying property pursuant to the quitclaim deed." [App. Pg. A-8]. Thus, while the Marksons may be precluded from bringing a wrongful levy claim against the United States, neither A & W nor the Arizona Courts have cited one authority that precludes the Marksons from bringing an action in quiet title under Arizona Law to challenge the validity of A & W's title on the ground that the IRS failed to strictly adhere to the statutory procedures for perfecting their administrative lien and levy against the subject property.

CONCLUSION

The Arizona Court of Appeals incorrectly concluded that the Marksons' quiet title action under Arizona Law, challenging the validity of A & W's title to the subject property because the IRS failed to strictly adhere to the statutory requirements for perfecting their administrative

lien and levy against the subject property, was precluded because the Marksons could not support a claim against the United States for wrongful levy under 26 U.S.C. § 7426.

Accordingly, and for the forgoing reasons, this Court should issue its Writ of Certiorari to the Arizona Court of Appeals for the State of Arizona, Division One, and in further proceedings as the Court deems necessary this Court should vacate the Arizona Court of Appeals April 20, 1996 Memorandum Decision and order that this action be remanded to the Arizona Superior Court in Maricopa County for further proceedings not inconsistent with the decision of this Court.

RESPECTFULLY SUBMITTED this 30TH day of January, 1997.

Thomas A Markson Sandra M Markson

Thomas A. Markson Sandra M. Markson
c/o 5804 West Vista Avenue #165
Glendale, Arizona 85301
(602) 841-4775
Petitioners, In Pro Per

APPENDIX A

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Supreme Court

State of Arizona

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November 1, 1996

RE: THOMAS A. MARKSON/SANDRA M. MARKSON
vs. A & W INVESTORS GROUP INC.
Supreme Court No. CV-96-0348-PR
Court of Appeals No. 1 CA-CV 95-0330
Maricopa County No. CV 94-18772

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 1, 1996, in regard to the above-referenced cause:

ORDERED: Appellants' Petition for Review by Supreme Court = Denied

A panel composed of Chief Justice Feldman, Vice Chief Justice Zlaket, and Justice Moeller participated in the determination of this matter.

Record returned to Court of Appeals, Division One, Phoenix this 1st day of November, 1996.

NOEL K. DESSAINT, Clerk

TO: Thomas A. Markson
Sandra M. Markson
Sanford J. Germain, Esq., Muth, Casebolth & Germain, PLC

Earl E. Berg, Esq., Murphy & Posner
Glen D. Clark, Clerk, Court of Appeals, Division One
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED MAY 20 1996
GLEN D. CLARK, CLERK

THOMAS A. MARKSON, and SANDRA M. MARKSON husband and wife as joint tenants	1 CA-CV 95-0330
Plaintiffs-Appellants, v.	MARICOPA County Superior Court No. CV 94-18772
A & W INVESTORS GROUP, INC., SERVICE,	O R D E R
Defendant-Appellee.	

The Court having considered appellants' Motion for Reconsideration

IT IS ORDERED denying appellants' motion for reconsideration.

DATED this 20th day of May, 1996.

Ruth V. McGregor
Chief Judge

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED APR 20 1996
GLEN D. CLARK, CLERK

THOMAS A. MARKSON, and SANDRA M. MARKSON, husband and wife as joint tenants	) 1 CA-CV 95-0330
Plaintiffs-Appellants,	) DEPARTMENT E
v.	) MEMORANDUM DECISION
A & W INVESTORS GROUP, INC., SERVICE,	) (Not for Publication; Rule 28, Arizona Rules of Civil Appellate Procedure
Defendant-Appellee.	)

Appeal from the Superior Court of Maricopa County
Cause No. CV 94-18772
The Honorable Frank T. Galati, Judge

AFFIRMED

Thomas A. Markson and Sandra M. Markson
In Propria Persona Glendale

Muth, Casebolt & Germaine, P.L.C.
by Sandford J. Germaine and Phoenix
Murphy & Posner
by Earl E. Berg Phoenix
Attorneys for Defendant-Appellee

M c G R E G O R, Presiding Judge

Plaintiffs-Appellants Thomas A. Markson and Sandra M. Markson (the Marksons) appeal the trial court's order granting summary judgment in favor of defendant-appellee A & W Investor's Group (A & W). We have jurisdiction over this appeal pursuant to Arizona Revised Statutes Annotated (A.R.S.) section 12-2101.

I.

In September 1980, Charles Dare Schaut and Pamela Schaut (the Schauts) purchased real property in Glendale, Arizona (the property). The Schauts transferred the property by quitclaim deed to the Dare Schaut Family Trust (the Trust) in August 1982). In September 1993, the Internal Revenue Service (IRS) seized the property to satisfy unpaid income taxes of $1,500,000 owed by the Schauts. The IRS sold the property to A & W during a public tax lien sale in October 1993. In May 1994, after the redemption period expired, the IRS issued title to A & W.

In November 1993, the Schauts and the Trust filed an action *in propria persona* to quiet title against A & W, arguing that A & W could claim no interest in the property because the IRS failed to follow statutory guidelines in seizing the property. The trial court dismissed the action with prejudice as to the Schauts on the grounds that, because they had transferred the property to the Trust, they lacked standing to challenge the seizure. The trial court also dismissed the Trust's action without prejudice because it was not represented by counsel, as legally required. *See C.E. Pope Equity Trust v. U.S.*, 818 f.2d 696, 697 (9th Cir., 1987) (holding that a non-lawyer may not appear *in propria persona* on behalf of a trust). However, the court granted the Trust leave to amend its complaint, ordering that failure to appear with counsel before November 29, 1994 would result in dismissal with prejudice.

Rather than obtain counsel, on October 7, 1994, the Trust transferred its interest in the property to the Marksons by quitclaim deed. The Marksons then filed an action *in propria persona* to quiet title against A & W. The Marksons' complaint, from which this appeal stems, closely paralleled the allegations set forth in the complaint filed by the Schauts and the Trust.

The trial court dismissed the Marksons' complaint with prejudice on the grounds that the Trust had transferred its interest in the property to the Marksons solely to circumvent the court's order that the Trust be represented by counsel; that the Marksons lacked standing to bring a quiet title action against A & W; that the Trust's claim of wrongful levy by the IRS could not be transferred by quitclaim deed; and that the statute of limitations applicable to claims of wrongful levy barred the Marksons' action. After the trial court denied their motion to reconsider, the Marksons brought this appeal.

II.

In reviewing a dismissal for failure to state a claim, we accept the material allegations of the complaint as true and uphold the dismissal only if the plaintiff would not be entitled to relief under any facts susceptible of proof under the claims stated. *E.g., Donnelly Constr. Co. v. Oberg/Hunt/Gilleland*, 139 Ariz. 184, 677 P.2d 1292, 1294 (1984). However, we will affirm the trial court's judgment if any of the court's alternative grounds provide an adequate basis for dismissal. *See Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App., 1986)

A.

We first consider whether, as A & W argues, the Trust's failure to appear with counsel before November 29, 1994, as ordered by the trial court, resulted in the dismissal with prejudice of the Trust's action. The Marksons assert that, because they filed a complaint as the "assignees" of the Trust before November 29, 1994,

the dismissal remained without prejudice. We agree with A & W that the commencement of the Marksons's action did not affect the out of the action initiated by the Trust.

The quitclaim deed between the Trust and the Marksons transferred the Trust's interest, if any, in the property underlying the Trust's cause of action, not the cause of action itself. *Accord Sprang v. Peterson Lumber, Inc.*, 165 Ariz. 257, 798 P.2d 395 (App. 1990). The Marksons therefore became not the Trust's assignees, but rather successors to whatever interest the Trust held in the property. For that reason, the Marksons' decision to file their own complaint did not suspend the effect of the court's order rendering final the dismissal of the Trust's complaint when it failed to appear through counsel.

A & W, taking the argument a step further, asserts that, because the Trust's action was dismissed with prejudice, the Marksons are barred from maintaining any action to quiet title. We do not agree. Because the quitclaim deed was sufficient to transfer to the Marksons any property interest held by the Trust, the Marksons could file an action to secure whatever rights they received in the underlying property pursuant to the quitclaim deed. The remaining question thus is whether this action provides any basis for quieting title in the Marksons.

B.

To succeed in quieting title in their name, the Marksons must establish that the IRS could not convey valid title to A & W, for if the transfer of title to A & W was valid, the Trust had no interest left to transfer through its quitclaim deed to the Marksons. As the Marksons concede, their sole basis for contesting A & W interest in the property rests upon the allegation that the IRS failed to follow statutory procedures in levying upon the property. The Marksons thus can succeed in this quiet title action only if they can support a claim of wrongful levy against the IRS. This they cannot do for at least two reasons.

First, as the Marksons again concede, the Trust could not transfer or assign its wrongful levy claim because that is a personal remedy. Because the only potential basis for establishing that A & W did not obtain a valid title rested upon the wrongful levy claim, the Marksons lack any means for quieting title in themselves.

Second, as A & W argues, even if the Trust could have and had assigned its wrongful levy claim to the Marksons, the nine month wrongful levy statute of limitations would bar this action, which the Marksons instituted more than a year after the levy.[4] *See* I.R.C. § 6532(c)(1) (1986). The Marksons seek to avoid the limitations period by contending that, because this action seeks to quiet title rather than to enforce a claim for wrongful levy against the IRS, Arizona's four (sic) quiet title statute of limitations applies. *See* A.R.S. § 12-524. Once again, however, the Marksons face the insurmountable problem posed by their concession that their only claim to title rests on their allegation that, by virtue of a wrongful levy, the IRS possessed no interest in the property and therefore transferred none to A & W. Because the Marksons assert no interest in the property that would support a judgment against the IRS, the expiration of the wrongful levy statute of limitations renders the Marksons' quiet title action meritless.

4/ The wrongful levy statute provides that

> [i]f a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is a assessed the tax out of which the levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States . . . .

I.R.C. § 7426(a)(1) (1986)

III.

For the reasons stated above, we affirm the court's order dismissing the Marksons' complaint for failure to state a claim and awarding A & W its costs. In the exercise of our discretion, we grant A & W its costs and attorneys' fees for this appeal upon compliance with Rule 21(c) of the Arizona Rules of Civil Appellate Procedure.

/s/ Ruth V. McGregor
Ruth V. McGregor
Presiding Judge

CONCURRING:

/s/ Thomas C. Kleinschmidt
Thomas C. Kleinschmidt, Judge

/s/ R.J. Gerber
Rudolph J. Gerber, Judge

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IN THE SUPERIOR COURT STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

FILED MAR 7, 1996

THOMAS A. MARKSON, and SANDRA M. MARKSON	)
Plaintiffs	) No. CV 94-18772
v.	) FINAL JUDGMENT
A & W INVESTORS GROUP, INC., SERVICE,	) (Assigned to the Honorable Frank T. Galati)
Defendant	)

This matter came on for hearing on Defendant's, A & W INVESTORS GROUP, INC. (hereinafter referred to as "A & W"), Motion to Dismiss and for Sanctions (hereinafter collectively the "Motion"). A & W, having filed the Motion and a Reply in Support of the Motion and Plaintiffs, THOMAS A. MARKSON and SANDRA M. MARKSON (hereinafter collectively the "Marksons"), having filed their Response to the Motion, the Court having read and considered the Motion, Response and Reply, and oral argument on the Motion having been

heard by the Court sitting without a jury on January 25, 1995; A & W by its attorneys, Murphy & Posner, and the Marksons appearing Pro Per; the Court finding that this is no just cause for delay in granting judgment and the Court expressly determines that formal final judgment pursuant to Rule 54(b) Ariz.R.Civ.P., shall be entered.

NOW, THEREFORE, ITS IS ORDERED, ADJUDGED AND DECREED:

1. Granting A & W's Motion to Dismiss the Complaint with prejudice for the following reasons:

a. Judge Riddel's order and the final judgment gave the Dare Schaut Family Trust (hereinafter the "Trust") until November 29, 1994 to refile its claims. The trust did not do so. The circumstances here support the conclusion that the quit-claiming of the Trust's interests on October 7, 1994 was done solely to get around Judge Riddel's decision that the trust be allowed to refile only if represented by counsel.

b. Assuming the trust had a claim for wrongful levy by the IRS, it was not transferable by quit-claim. The Marksons had no interest in the property described as follows:

> Lot Fifty-Four (54), SAN OASIS according to the plat of the record in the office of the County Recorder of Maricopa County, Arizona, in Book 108 of Maps, page 10;
>
> aka: 4309 West Griswold,
> Glendale, Arizona 85302.

at the time it was seized and sold to A & W.

c. The Marksons -- as purported assignees of the interest of a party who has failed to pay taxes -- have no standing to bring a quiet title action against an innocent tax sale purchaser.

d. Any wrongful levy action had to be filed by no later than nine months after September 13, 1993.

2. Denying A & W's request for sanctions.

DONE IN OPEN COURT this 3rd day of March, 1995.

/s/ F.T. Galati
The Honorable Frank T. Galati
Judge of the Superior Court

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THOMAS A. MARKSON
SANDRA M. MARKSON
c/o 5804 West Vista Avenue #165
Glendale, Arizona 85301
(602) 841-4775
Plaintiffs, In Pro Per

IN THE SUPERIOR COURT STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THOMAS A. MARKSON, and SANDRA M. MARKSON	)	
	)	No. CV 94-18772
Plaintiffs,	)	
	)	
v.	)	COMPLAINT
	)	
A & W INVESTORS GROUP, INC., SERVICE,	)	(Assigned to the Honorable Frank T. Galati)
Defendant	)	

COME NOW the Plaintiffs and for their complaint allege and aver as follows:

I. JURISDICTION AND VENUE

1. The superior Court has jurisdiction pursuant to Article VI, § 14, Clause 2 of the Constitution for the State of Arizona and ARS, § 12-1101 *et. seq*.

2. Venue is proper as the parties and the subject property are located in Maricopa County.

II. PROPERTY DESCRIPTION

3. The Plaintiffs are currently the lawful owner of all rights, title and interest to the real property described below;

Lot Fifty-Four (54), SAND OASIS, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 108 of Maps, page 10.

(Hereinafter referred to as "property").

III. PARTIES

4. Plaintiffs are husband and wife and can be found in Maricopa County, Arizona.

5. Defendant A & W Investors Group,Inc. is a corporation chartered and authorized to do business under the laws of the State of Arizona.

IV. GENERAL STATEMENT

6. For the years 1979 through 1986 Plaintiff Charles Dare Schaut was allegedly assessed taxes totalling $1,409,593.90. The assessments for the years 1979 and 1980 allegedly occurred on November 6, 1989. The assessments for the years 1981 through 1984 allegedly occurred on June 4, 1990. The assessments for the years 1985 and 1986 allegedly occurred on June 11, 1990.

7. For the years 1979 through 1987 Plaintiff Pamela L. Schaut was alleged assessed taxes totalling $98,465.84. All the assessments allegedly occurred on May 31, 1991.

8. On September 15, 1980, Plaintiffs Charles Dare and Pamela L. Schaut took title to the property by Joint Tenancy Deed. Said Deed is recorded at Docket 14946, Page 12, in the County Recorder's Office, County of Maricopa, State of Arizona.

9. On or about August 20, 1982, Plaintiffs Charles D. and Pamela L. Schaut exchanged into the Dare Schaut Family Trust, title to the above described property by Quitclaim Deed. Said Deed is recorded in Docket 16302, Page 440, in the Office of the County Recorder, County of Maricopa, State of Arizona.

10. On September 13, 1993, the United States by and through its officers, agents and employees in the Internal Revenue Service (hereinafter IRS), purportedly seized the property described above from the Plaintiffs. The property was allegedly seized to satisfy the tax assessments against Charles Dare and Pamela Schaut. The Notice of Seizure was given on September 13, 1993 by mailing it to the Plaintiffs via Certified Mail.

11. On October 26, 1993, the United States, by and through the IRS, purportedly sold said seized property to Defendant A & W Investment Group, and then and there issued a Certificate of Sale to said Defendant. Notice of the Sealed Bid Sale was allegedly given by leaving the Notice of Sale at the 4309 West Griswold, Glendale, Arizona 85302, but without personally delivering it to either the Schauts their authorized agents.

12. Neither the Notice of Seizure nor the Notice of Sale was given either personally or otherwise to the Trustees of the Dare Schaut Family Trust.

13. On May 18, 1993, the District Director in Phoenix, Arizona executed the Director's Deed transferring to the Defendant any interest that the United States had acquired, if there was any through the seizure and sale. The Deed was recorded in the County Recorder's Office on May 23, 1994 at instrument number 94-0410768.

14. On October 7, 1994, the Trustees of the Dare Schaut Family Trust transferred title by Quit Claim Deed to the Plaintiffs as Joint Tenants with full rights of survivorship. On October 11, 1994, the Deed was recorded in the County Recorder's Office, County of Maricopa, State of Arizona at instrument number 94-0733641.

15. At the time the property was seized the Dare Schaut Family Trust was the owner of record, was not liable to pay any taxes and there were no liens in favor of

the United States against Plaintiff Dare Schaut Family Trust for any taxes.

16. At the time Plaintiffs Charles D. and Pamela L. Schaut transferred title to the property to the Dare Schaut Family Trust, there were no tax assessments or liens in favor of the United States against Charles D. and Pamela L. Schaut.

17. No administrative tax lien or levy may be applied to property transferred prior to the existence of the assessment.

18. Before the United States could assert its lien against the property, it was required to have the transfer set aside as a fraudulent transfer. Even assuming arguendo that the transfer from Charles D. and Pamela L. Schaut to the Dare Schaut Family Trust was fraudulent as to United States, the limitation for obtaining the required judicial declaration expired on September 22, 1986. The Deed transferring, title from Charles D. and Pamela L. Schaut to the Dare Schaut Family Trust, was recorded on September 22, 1982. The limitation for setting aside fraudulent transfers is controlled by Arizona Law. The limitation is four (4) years as set forth in ARS, § 44-1009.

19. Prior to seizing and selling the property belonging to the Dare Schaut Family Trust, the United States did not assess taxes against the Trust as the Transferee of Charles D. and Pamela L. Schaut as required by Internal Revenue Code (IRC), § 6901.

20. Prior to seizing and selling the property belonging to the Dare Schaut Family Trust, the United States failed to follow the procedures required to establish that the Trust was a Nominee or Alter Ego of Charles D. and Pamela L. Schaut.

21. Prior to seizing and selling the property Revenue Officer Richard B. Foley failed to obtain the Director's Warrant for Distraint.

22. Even if the property were to be found to belong to Charles D. and Pamela L. Schaut, prior to seizing and selling the property Revenue Officer Richard B. Foley failed to obtain consent to seize the primary residence as required by IRC, § 6334(e).

V. CAUSE OF ACTION

23. The Plaintiffs reallege each and every allegation and averment of paragraphs 1 through 22, and incorporate the same by this reference, as if fully set forth herein.

24. The Plaintiffs are credibly informed and believe and therefore allege that the Defendant is claiming or may claim an estate, title, interest, lien or right in and to and possession of the above described property or some part thereof, adverse to and in conflict with the Plaintiffs' rights, title and interests.

25. The Defendant may claim an interest, in whole or in part and adverse to the Plaintiffs, based upon the Certificate of Sale issued at the tax sale or the Director's Deed.

26. Any right, title or interest claimed by the Defendant is arbitrary and capricious. The Certificate of Sale and the Director's Deed are void as the United States failed to perfect service of the Notice of Seizure and failed to otherwise follow mandatory statutory procedures before seizing and selling the property. The void Certificate of Sale and Director's Deed neither transferred neither title nor color of title to the property sold at the tax sale.

27. The title, interest and possession in the property that the Plaintiffs acquired from the Dare Schaut Family Trust by the quit claim deed is superior to any claimed interest of the Defendant. The United States's failure to follow mandatory statutory procedures before the sale of the property has rendered the Certificate of Sale and Director's Deed invalid and did not divest the Dare

Schaut Family Trust of its right, title and interest in the property. The purchaser failed to exercise due diligence to assure that the United States had complied with all procedural and statutory requirements. Said statutory requirements were a condition precedent to the validity of the Certificate of Sale and Director's Deed

28. As a direct and proximate result there is a cloud upon the title of the Plaintiffs property and they have no other plain, speedy or adequate remedy to remove the cloud.

VI. RELIEF SOUGHT

WHEREFORE, the Plaintiffs request the following relief:

A. Trial by jury on all issues, so triable; and,

B. The Defendant be required to set forth the right and nature of its claim to the property; and,

C. That all adverse claims of the Defendant in and to said property be determined by a decree of this Court; and,

D. That this Court adjudge and decree;

1. That the Certificate of Sale and Director's Deed issued to the Defendant are unlawful, invalid and void; and,

2. That all rights, title and interest to the property are quieted to the Plaintiffs; and,

3. That the Plaintiffs own and are entitled to quiet, lawful, continuous and peaceful use and possession of said property; and that the Defendant has no lawful or legal right, title, estate, lien or interest in or right to possession whatsoever in or to said property, or any part thereof; and,

5. That the Plaintiffs take judgment in their favor and against the Defendant; and,

E. That the Plaintiffs be awarded reasonable costs and fees incident to the prosecution of this cause; and,

F. That the Court vacate the award of attorneys fees granted to the Defendant in DARE SCHAUT FAMILY TRUST v. A & W INVESTORS GROUP, INC., CV 93-25424

G. That the Court award such other and further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED this 24th day of November, 1994.

/s/ Thomas A. Markson
THOMAS A. MARKSON

/s/ Sandra M. Markson
SANDRA M. MARKSON

c/o 5804 W. Vista Avenue #165
Glendale, Arizona 85301
Plaintiffs, In Pro Per

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APPENDIX B
STATUTES

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APPENDIX B

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§ 12-524. City lot claimed under recorded deed; five year limitation.

An action to recover a lot located in a city or town from a person having recorded deed therefor, who claims ownership and has paid the taxes thereon, shall be brought within five years after the cause of action accrues, and not afterward, provided that the person against whom the action is brought, by himself or his grantors, has claimed ownership thereof and has paid the taxes thereon for at least five consecutive years next preceding the commencement of such action.

ARTICLE 1. ACTION TO QUIET TITLE

§ 12-1101. Parties; claim; service on attorney general.

A. An action to determine and quiet title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession, against any person or the state when such person or the state claims an estate or interest in the real property which is adverse to the party bringing the action.

B. When the state is made defendant a copy of the summons and complaint shall be served upon the attorney general.

§ 12-1102. Complaint.

The complaint shall:

1. Be under oath.

2. Set forth generally the nature and extent of plaintiff's estate.

3. Describe the premises.

4. State that plaintiff is credibly informed and believes defendant makes some claim adverse to plaintiff. When the state is made defendant, the complaint shall set forth with particularity or on information or belief the claim of the state adverse to plaintiff.

5. Pray for establishment of plaintiff's estate and that defendant be barred and forever estopped from having or claiming any right or title to the premises adverse to plaintiff.

§ 12-1103. Disclaimer of interest and recovery of costs; request for quit claim deed; disclaimer of interest by state.

A. If defendant, other than the state, appears and disclaims all right and title adverse to plaintiff, he shall recover his costs.

B. If a party, twenty days prior to bringing the action to quiet title to real property, requests the person, other than the state, holding an apparent adverse interest or right therein to execute a quit claim deed thereto, and also tenders to him five dollars for execution and delivery of the deed, and if such person refuses or neglects to comply, the filing of a disclaimer of interest or right shall not avoid the costs and the court may allow plaintiff, in addition to the ordinary costs, an attorney's fee to be fixed by the court.

C. If, after appropriate investigation, it appears to the attorney general that the state claims no right or title to the property adverse to plaintiff, he may file a disclaimer of right and title.

§ 12-1104. Allegation of lien or interest claimed by adverse party; jurisdiction of court to enter decree.

A. In an action to quiet title to real property, if the complaint sets forth that any person or the state has or claims an interest in or a lien upon the property, and that the interest or lien or the remedy for enforcement thereof is barred by limitation, or that plaintiff would have a defense by reason of limitation to an action to enforce the interest or lien against the real property, the court shall hear evidence thereon.

B. If it is proved that the interest or lien or the remedy for enforcement thereof is barred by limitation, or that plaintiff would have a defense by reason of limitation to an action to enforce the interest or lien against the real property, the court shall have jurisdiction to enter judgment and plaintiff shall be entitled to judgment barring and forever estopping assertion of the interest or lien in or to or upon the real property adverse to plaintiff.

26 U.S.C. § 6532

Sec. 6532. Periods of limitations on suits.

(a) Suits by taxpayers for refund.

(1) General Rule. No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

(2) Extension of time. The 2-year period prescribed in paragraph (1) shall be extended for such period as may be agreed upon in writing between the taxpayer and the Secretary.

(3) Waiver of notice of disallowance. If any person files a written waiver of the requirement that he be mailed a notice of disallowance, the 2-year period prescribed in paragraph (1) shall begin on the date such waiver is filed.

(4) Reconsideration after mailing of notice. Any consideration, reconsideration, or action by the Secretary with respect to such claim following the mailing of a notice by certified mail or registered mail

of disallowance shall not operate to extend the period within which suit may be begun.

(5) Cross reference. For substitution of 120-day period for the 6-month period contained paragraph (1) in a title 11 case see section 505(a)(2) of title 11 of the United States Code.

(b) Suits by United States for recovery of erroneous refunds.

Recovery of any erroneous refund by suit under section 7405 shall be allowed only if such suit is begun within 2 years after the making of such refund, except that such suit may be brought at any time within 5 years from the making of the refund if it appears that any party of the refund was induced by fraud or misrepresentation of a material fact.

(c) Suits by persons other than taxpayers.

(1) General rule. Except as provided by paragraph (2), no suit or proceeding under section 7426 shall be begun after the expiration of 9 months from the date of the levy or agreement giving rise to such action.

(2) Period when claim is filed. If a request is made for the return of property described in section 6343(b), the 9 month period prescribed in paragraph (1) shall be extended for a period of 12 months from the date of the filing of such request or for a period of 6 months from the date of mailing by registered or certified mail by the Secretary to the person making such request of a notice of disallowance of the part of the request to which the action relates, whichever is shorter.

26 U.S.C. § 7426

Sec. 7426. Civil actions by persons other taxpayers.

(a) Actions permitted.

(1) Wrongful levy. If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is

assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

(2) Surplus proceeds. If property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property junior to that of the United States and to be legally entitled to the surplus proceeds of such sale may bring a civil action against the United States in a district court of the United States.

(3) Substituted sale proceeds. If property has been sold pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale, any person who claims to be legally entitled to all or any part of the amount held as a fund pursuant to such agreement may bring a civil action against the United States in a district court of the United States.

(b) Adjudication.

The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances.

(1) Injunction. If a levy or sale would irreparably injure rights in property which the court determines to be superior rights of the United States in such property the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

(2) Recovery of property. If the court determines that such property has been wrongfully levied upon, the court may --

(A) order the return of specific property if the United States is in possession of such property;

(B) grant a judgment for the amount of money levied upon; or

(C) if such property was sold, grant a judgment for an amount not exceeding the greater of --

(i) the amount received by the United States from the sale of such property, or

(ii) the fair market value of such property immediately before the levy.

For the purposes of subparagraph (CC), if the property was declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of the such property.

(3) Surplus proceeds. If the court determines that the interest or lien of any party to an action under this section was transferred to the proceeds of a sale of such property, the court may grant a judgment in an amount equal to all or any part of the amount of the surplus proceeds of such sale.

(4) Substituted sale proceeds. If the court determines that a party has an interest in or lien on the amount held as a fund pursuant to an agreement described in suction 6325(b)(3) (relating to substitution of proceeds of sale), the court may grant a judgment in an amount equal to all or any party of the amount of such fund.

(c) Validity of assessment.

For purposes of an adjudication under this section, the assessment of tax upon which the interest or lien of the United States shall be conclusively presumed to be valid.

(d) Limitation on rights of action.

No action may be maintained against any officer or employee of the United States (or former officer or

employee) or his personal representative with respect to any acts for which an action could be maintained under this section.

(e) Substitution of United States as party.

If an action, which could be brought against the United States under this section, is improperly brought against any officer or employee of the United States (or former officer or employee) or his personal representative, the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party for such officer or employee as of the time such action was commenced upon proper service of process on the United States.

(f) Provision inapplicable.

The provisions of 7422(a) (relating to prohibition of suit prior to filing claim for refund) shall not apply to actions under this section.

(g) Interest

Interest hall be allowed at the overpayment rate established under section 6621 --

(1) in the case of a judgment pursuant to subsection (b)(2)(B), from the date the Secretary or his delegate receives the money wrongfully levied upon to the date of the payment of such judgment; and

(2) in the case of a judgment pursuant to (b)(2)(C), from the date of the sale of the property wrongfully levied upon to the date of payment of such judgment.

(h) Cross reference.

For a period of limitation, see section 6532(c).